Supreme Court, U. S.
FILED
SEP 30 1975
MICHAEL RODAK, JR., CLERK

No. 75-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1975

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals abused its discretion in declining to issue a writ of prohibition after the district court struck language from the indictments that was not essential to state an offense.

In December 1974, the grand jury for the Northern District of California returned two indictments, charging petitioners [1] and others [2] with having entered into a combination and conspiracy in unreasonable restraint of trade sometime prior to 1970 and continuing through at least 1972, in violation of Section 1 of the Sherman Act, "the substantial terms of which were, *among others*:

(a) to fix and raise the basis prices of refined sugar;

(b) to fix prepaid freight applications;

(c) to eliminate, reduce and prevent giving of allowances to customers for refined sugar; and

(d) to fix, raise, maintain and stabilize the effective selling price of refined sugar" (Pet. App. 5; emphasis supplied).

Petitioners moved to dismiss the indictments on the ground that the phrase "among others" therein failed adequately to apprise them of what they must be prepared to meet. The government contended that the indictments were valid, and alternatively moved

[1] Petitioner California and Hawaiian Sugar Company was named as a defendant in both indictments; petitioner American Crystal Sugar Company was named as a defendant in one indictment.

[2] On motions under Rule 60(2), the Court on September 18, 1975 dismissed the petition for a writ of certiorari as to Union Sugar Division, Consolidated Foods Corporation; Holly Sugar Corporation; Great Western Sugar Company; and Amalgamated Sugar Company.

to strike the words "among others". The district court granted the motion and ordered the words "among others" stricken (Pet. 4-6).

The defendants then applied to the court of appeals for a writ of prohibition against all further proceedings in the district court, on the ground that by striking words from the indictments the district court had voided them and that it was therefore deprived of jurisdiction, under the rule announced in *Ex parte Bain*, 121 U.S. 1. The court of appeals denied the petition without opinion (Pet. App. 24-25).[3]

1. The court of appeals acted well within its discretion in declining to issue a writ of prohibition in this case. An extraordinary writ is a drastic remedy to be used only in unusual circumstances where other remedies are unavailable. *Alexander* v. *Crollott*, 199 U.S. 580. Since petitioners may challenge the district court's elimination from the indictment of the phrase "among others" on appeal of their convictions, there was no occasion for the court of appeals to issue a writ of prohibition to review the question at this juncture.[4]

[3] On July 31, 1975, petitioner American Crystal Sugar Company pleaded *nolo contendere* in the district court. The trial of petitioner California and Hawaiian Sugar Company is scheduled to commence on November 10, 1975.

[4] See *Roche* v. *Evaporated Milk Assoc.*, 319 U.S. 21; *Parr* v. *United States*, 351 U.S. 513; *Tidewater Oil Co.* v. *United States*, 409 U.S. 151; *In re Rice*, 155 U.S. 396; *In re Huguley Mfg. Co.*, 184 U.S. 297; *Witherspoon* v. *Walsh*, 463 F.2d 951 (C.A.D.C.); *United States* v. *Green*, 414 F.2d 1174 (C.A.D.C.);

2. In any event, the district court's decision to strike the phrase "among others" from the indictments did not deprive petitioners of any constitutional rights. Their Fifth Amendment right to a grand jury indictment in a "capital, or otherwise infamous crime" was inapplicable, since at the time of the alleged conspiracy a violation of the Sherman Act was only a misdemeanor and the maximum penalty was $50,000 or imprisonment for one year, or both.[5] See 18 U.S.C. 4083; Rule 7(a), Fed. R. Crim. P. Moreover, there is no realistic possibility that the grand jurors would have declined to indict petitioners had the phrase "among others" not been included in the indictments. Nor were petitioners deprived of their Sixth Amendment right to be informed of the nature and cause of the accusation against them, since the phrase "among others" was surplusage.

3. Finally, contrary to petitioners' assertion, there is no clear conflict among the circuits on whether a district court may strike or disregard a portion of the indictment that is not essential to the offense.[6]

In re Alix, 166 U.S. 136; *General Tire and Rubber Co.* v. *Watkins*, 326 F.2d 926 (C.A. 4), certiorari denied, 377 U.S. 909.

[5] 15 U.S.C. 1. The Antitrust Procedures and Penalties Act, 88 Stat. 1706, which went into effect December 21, 1974, makes violations of the Sherman Act a felony and provides a maximum penalty of three years' imprisonment or $100,000 individual fine, or both.

[6] The decisions upon which petitioners rely (Pet. 10-14) involve the substitution in the indictment of different allegations (*United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (C.A. 2); *United States* v. *Williams*, 412 F.2d 625 (C.A. 3); *United States* v. *Goldstein*, 502 F.2d 526 (C.A. 3)); or the issuance of an indictment which had not been reviewed by all the members of the grand jury (*Gaither* v. *United States*, 413 F.2d 1061 (C.A.D.C.)). Any conflict within the Ninth Circuit presents a matter appropriate for resolution by that Court *en banc*.

To be sure, a court may not add charges to an indictment; as this Court restated the rule it first enunciated in *Ex parte Bain*, 121 U.S. 1, upon which petitioners primarily rely, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217. But a district court may strike from an indictment language, such as that in the instant case, that is surplusage.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[7] *United States* v. *Krepper*, 159 F.2d 958 (C.A. 3); *Thomas* v. *United States*, 398 F.2d 531 (C.A. 5).

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